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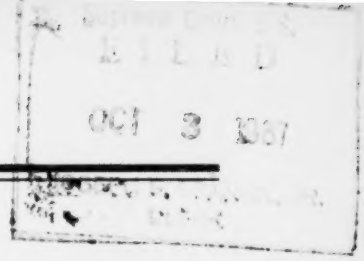

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILIP COOMBE, Superintendent of
Eastern Correctional Facility,

Petitioner,

—against—

ROBERT ESCALERA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 3, 1987

QUESTIONS PRESENTED

1. Whether a criminal defendant who claims in state court that the preclusion of an alibi witness was an abuse of discretion under state statute, thereby exhausts state remedies for a claim made in a petition for federal habeas corpus that the preclusion violated his federal constitutional rights; whether the Second Circuit rule that finds exhaustion in these circumstances is inconsistent with basic principles of federalism.

2. Whether the preclusion of an alibi witness in a state criminal trial was constitutionally permissible where defense counsel, in violation of section 250.20 of the New York Criminal Procedure Law, inexcusably failed to reveal his intent to call that witness until after the completion of the State's case and during the testimony of the second defense witness, and where defense counsel introduced alibi evidence through other witnesses.

3. Whether a federal habeas corpus court is required to presume that a state court made appropriate findings of fact to support its rulings, where the state court did not expressly state all of the factual findings underlying its decision.

LIST OF PARTIES

The petitioner is Philip Coombe, the Superintendent of Eastern Correctional Facility, which is the state institution where the respondent was at one time incarcerated; Mr. Coombe is represented in this federal habeas corpus proceeding by Kings County District Attorney Elizabeth Holtzman, by agreement with the Attorney General of the State of New York. The respondent is Robert Escalera, who was convicted of felony murder in the New York state courts and filed the petition for federal habeas corpus that is the subject of this litigation.

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IN THE

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OCTOBER TERM, 1987

No. 87-____

PHILIP COOMBE, Superintendent of
Eastern Correctional Facility,

Petitioner,

—against—

ROBERT ESCALERA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Philip Coombe, Superintendent of Eastern Correctional Facility in New York, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that remanded this case to the United States District Court for the Eastern District of New York, with a direction to grant Robert Escalera's petition for a writ of habeas corpus unless the State conducts a new *Wade* hearing and grants Escalera a new trial within sixty days. That judgment reversed a judgment of the United States District Court for the Eastern District of New York, which had dismissed the petition for a writ of habeas corpus.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported, and is reproduced in the Appendix to this petition. The opinion of the United States District Court for the Eastern District of New York is reported at 652 F. Supp. 1316 (E.D.N.Y. 1987), and is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 13, 1987. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

(reproduced at pp. 41a-44a of the Appendix to this petition)

1. United States Constitution, Sixth Amendment
2. United States Constitution, Fourteenth Amendment
3. 28 United States Code § 2254
4. New York Criminal Procedure Law § 250.20

STATEMENT OF THE CASE

Introduction

The defendant, Robert Escalera, was convicted of felony murder after a jury trial, for fatally shooting Jesus Cordero in the chest during an attempted robbery in Brooklyn, New York on August 18, 1975. The State's case at the trial included the testimony of two eyewitnesses to the shooting, Pasquale Nieves and Felix Torres, each of whom identified the defendant in court as the gunman.

The Motion to Suppress Identification Testimony

Prior to trial, the defendant moved to suppress the in-court identification testimony of both Nieves and Torres, on the ground that the reliability of that testimony was tainted by suggestive out-of-court identification procedures. Nieves, Torres, and the detective assigned to the case, Harold Ruger, testified at the hearing on the defendant's suppression motion. The defendant did not testify or call any witnesses at that hearing.

The hearing testimony showed that, on the evening of August 18, 1975, Nieves and Torres were walking with Jesus Cordero in a park. At about 6:30 p.m., they were approached by four men who announced a holdup. One of the robbers, whom Nieves and Torres each later identified as the defendant, shot Cordero in the chest, and the robbers fled. On September 3, 1975, Detective Ruger separately showed to Nieves and Torres the same series of eight photographs, which did not include a photograph of the defendant, and neither witness made an identification. On September 28, 1975, Ruger showed Nieves and Torres, who again were apart at the time of the viewing, ten photographs that consisted of the eight they had viewed on September 3 plus two others, one of which was a photograph of the defendant. Each witness picked out the photograph of the defendant. Later that day, Detective Ruger brought both witnesses to the police station, where they jointly viewed the defendant, who was alone, through a one-way mirror, and again identified him. The hearing court concluded that this showup was "highly irregular and improper" (H. 168),[1] but that the exhibition of ten photographs that preceded the showup was not suggestive and did not influence the in-court identifications made by Nieves and Torres. The court found that each witness's in-court identification "was based upon his own independent recollection" of the crime and was

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1 Numbers preceded by "H" in parentheses refer to pages of the suppression hearing transcript; numbers without prefix refer to pages of the trial transcript.

not influenced by the showup, and therefore held that the in-court identification testimony of each witness was admissible at the trial (H. 167, 169).

At the suppression hearing, Nieves and Torres each testified about an additional photographic viewing, which occurred at the police station, but Detective Ruger did not testify at the hearing about any such viewing. The testimony of Nieves and Torres about that viewing was inconsistent. Although each witness testified that he picked out the defendant's photograph, Nieves insisted that he was alone at the time of the viewing, while Torres testified that he and Nieves were together. In addition, the testimony of the two witnesses as to the date of that viewing differed by about one month.[2] In the hearing court's decision denying the motion to suppress, the court did not state its factual findings regarding a photographic viewing at the police station.

The Trial

At the trial, Nieves and Torres described the events surrounding the shooting and identified the defendant as the gunman. The defendant testified that he was at home at the time of the shooting, and his friend Samuel Gonzalez also testified in support of that defense. According to the defendant and Gonzalez, Gonzalez met the defendant at a bus stop at 5:30 p.m. on the day of the shooting, and, except for the period from 6:00 to 6:30 p.m., when the defendant claimed he was eating and showering, the two remained together until 7:30 p.m.

After a lunch recess that followed the testimony of a defense witness and the direct testimony of the defendant, defense counsel informed the court and the prosecutor, for the first

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2 Detective Ruger was the first witness to testify at the hearing, and he was not recalled to shed any further light on this matter. At the trial, Ruger testified that, according to police records, Nieves and Torres had viewed photographs before Ruger was assigned to the case on August 23, 1975. However, Ruger was not present at that viewing and had no information that either witness had picked out a photograph of the defendant.

time, that he intended to call the defendant's brother as an alibi witness. The court precluded the witness from testifying because the defendant had failed to provide pretrial notice of his intent to call this alibi witness, as required by New York Crim. Proc. Law (CPL) § 250.20.[3] The court observed that the proposed witness was "a member of the family fully known to the defense throughout" (234). The court further stated, "I have been given no reason, no plausible reason why the name of the defendant's brother was not originally included in the alibi notice when there was ample time for the District Attorney to have had the opportunity to speak to this witness" (292).[4] In addition, the court considered the disruptive effect on the court's schedule if the witness were allowed to testify after a continuance (291-92). The defendant rested that afternoon, and the jury began its deliberations the next day.

On August 19, 1976, the defendant was convicted of felony murder. On September 24, 1976, the defendant was sentenced to a prison term of fifteen years to life.

The State Appeal

The defendant appealed the judgment of conviction to the New York Supreme Court, Appellate Division, Second Judicial Department. On appeal the defendant asserted, among other claims, that the trial court abused its discretion under CPL § 250.20(3) by precluding the testimony of a potential alibi

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3 That statute provides that a defendant's obligation to serve a notice of alibi is triggered when the State serves and files a demand for an alibi notice, and that the defendant must serve and file any alibi notice within eight days after service of the State's demand. CPL § 250.20(1). The statute further provides that, if at the trial the defendant calls an alibi witness as to whom no notice was given, the court may exclude any testimony of that witness relating to the alibi. *Id.* § 250.20(3). The court may in its discretion receive such testimony, but, before doing so, the court must grant an adjournment if requested by the State. *Id.*

4 The defendant had served on the State a pretrial alibi notice as to Samuel Gonzalez and another defense witness. Although the notice regarding those witnesses was apparently served months after the statutory deadline, the defendant was permitted to call both witnesses at the trial.

witness. The defendant noted in his state court brief that there appeared to be "no New York cases interpretive of the discretionary provisions of C.P.L. 250.20 subd. 3" (Brief at 43). He therefore discussed five out-of-state cases that construed analogous statutes (Brief at 43-48), to "indicate the circumstances under which appellate courts have considered preclusion to be an abuse of discretion" (Brief at 43). The defendant then concluded that the trial court "abused its discretion in precluding the testimony of Peter Escalera" (Brief at 48-49). The defendant never asserted that the trial court's preclusion ruling violated any of his constitutional rights.

By an order dated February 27, 1978, the Appellate Division affirmed the judgment of conviction without opinion. 61 A.D.2d 890, 402 N.Y.S.2d 700. The defendant's application for leave to appeal to the New York Court of Appeals was denied. 44 N.Y.2d 953, 380 N.E.2d 342, 408 N.Y.S.2d 1032 (Wachtler, J.).

The Federal Court Proceedings

The defendant filed a petition dated April 15, 1985 for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The defendant claimed, first, that the preclusion of an alibi witness violated his sixth amendment right to call witnesses, and second, that the testimony identifying the defendant in court was so tainted by the pretrial identification procedures that admission of that testimony denied him due process of law. The State argued that the defendant had failed to exhaust the first claim in state court, and that in any event both claims were meritless.

By a memorandum and order dated January 30, 1987, the district court rejected both claims on the merits and dismissed the petition. 652 F. Supp. 1316, Appendix at 19a-40a (E.D.N.Y. 1987) (Glasser, J.). The district court held that the defendant's sixth amendment claim was exhausted under the test articulated in *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984). The

court held that the preclusion of the alibi witness did not violate the sixth amendment because (1) the defendant's intent to call his brother as an alibi witness was not revealed until during the defense case, and therefore was a substantial surprise to the State; (2) sanctions less severe than preclusion would have been ineffective; (3) the proffered testimony of the defendant's brother was not as crucial as the alibi testimony of Samuel Gonzalez, and the jury likely would have discounted the brother's testimony; (4) the lateness of the defendant's disclosure of his intent to call the witness created an obvious potential for prejudice to the State; and (5) there was no good excuse for the lateness of the notice, and that lateness may have evinced bad faith. 652 F. Supp. at 1323-24, Appendix at 30a-31a. In addition, the district court rejected the defendant's challenge to the admissibility of the identification testimony, finding that "[u]nder all the circumstances, the trial judge was well within his authority to find that there was clear and convincing evidence that in-court identification of Escalera was based on observations other than the improper showup." *Id.* at 1328, Appendix at 39a.

The United States Court of Appeals for the Second Circuit reversed the judgment and remanded the case to the district court, with a direction to grant the petition for a writ of habeas corpus unless the State conducts a new *Wade* hearing and grants the defendant a new trial within sixty days.[5] Appendix at 1a-18a. First, relying on *Daye*, the court of appeals held that the defendant had exhausted his sixth amendment claim in state court, because his claim in the Appellate Division was "sufficient to direct the court's attention to the Sixth Amendment." Appendix at 9a. Second, the court held that preclusion of the alibi witness violated the defendant's sixth amendment right to compulsory process. The court found that defense counsel "offered the court no reasonable explanation" for his failure to comply with the alibi notice statute, *id.* at 6a, but

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5 By an order dated September 15, 1987, the court of appeals granted the State's motion to stay the mandate, pursuant to Fed. R. App. P. 41(b), pending the filing of this petition for certiorari.

noted that there was no evidence that the defendant himself was culpable for that failure, *id.* at 12a. The court held that " '[a]bsent evidence of complicity, it is unreasonable to deprive a defendant of his right to present a defense, a right guaranteed to him by the Constitution of the United States, even if his attorney intentionally failed to timely provide a list of defense witnesses to the prosecution as required by the . . . rules of criminal procedure.' " *Id.* at 12a (alterations in original) (quoting *Chappee v. Massachusetts*, 659 F. Supp. 1220, 1225 (D. Mass. 1987), *appeal pending*, No. 87-1286 (1st Cir.)). The court of appeals found that "any prejudice to the prosecution was only potential," and that "the potential for prejudice to the prosecution could have been eliminated by a brief trial continuance." *Id.* at 13a-14a. The court found that the precluded testimony was vital to establishing the defendant's alibi, and concluded that the preclusion of the witness violated the sixth amendment. Finally, the court of appeals found "a conspicuous absence from the trial court decision of the crucial facts" regarding the photographic viewing by Nieves and Torres at the police station, and therefore held that "the trial court lacked the necessary clear and convincing evidence to support its conclusion that the in-court identification was the product of independent recollection." *Id.* at 16a.

This petition for certiorari challenges each of these three rulings of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case presents three separate, important issues of federal law, each of which was resolved incorrectly by the court below. First, the court erroneously held that the defendant exhausted his sixth amendment challenge to the preclusion of an alibi witness for failure to provide pretrial alibi notice, even though the defendant never fairly presented this federal constitutional claim in state court. Second, the court erroneously concluded on the merits that preclusion of an alibi witness was an unconstitutional sanction for the failure of the defendant to give timely notice of that witness. Finally, the court below failed to accord the proper standard of deference to the state trial court's determination of the defendant's motion to suppress identification evidence, and therefore erroneously ordered a new hearing on that motion. Each of these issues independently warrants the grant of certiorari to review the judgment below.

I. The Decision Below is Contrary to a Decision of this Court, and Contrary to the Decisions of Other Federal Courts of Appeals, as to what Constitutes the "Fair Presentation" of a Federal Claim in State Court that is Necessary to Exhaust State Remedies.

The defendant never asserted in the New York state courts the claim that the preclusion of his brother's alibi testimony violated the Constitution. Nevertheless, the court below determined that this federal constitutional claim was exhausted, and therefore addressed it on the merits. The court's determination rested on application of exhaustion standards that are inconsistent with the principles that underlie the exhaustion requirement, with the decision of this Court in *Anderson v. Harless*, 459 U.S. 4 (1982) (per curiam), and with the decisions of federal courts of appeals of other circuits.

The primary purpose of the exhaustion requirement is to minimize friction between the federal and state judicial systems. The exhaustion requirement furthers this purpose by

insuring that, before a federal court can upset a state court conviction, the state courts have had a fair opportunity to consider and to correct any alleged federal constitutional violation. *E.g.*, *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The Second Circuit has established a standard of exhaustion so relaxed that it makes an empty gesture out of the requirement, and fails utterly to serve the values of federalism that gave rise to the exhaustion requirement.

The Second Circuit first set forth its exhaustion standard in *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048 (1984). *Daye* held that a federal constitutional claim has been fairly presented to the state courts, and therefore has been exhausted, if the presentation of a similar claim in state court included "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, [or] (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." 696 F.2d at 194.

The *Daye* rule, as applied in this case, allows a defendant to obtain review in federal court of a constitutional claim that was never in fact asserted in the state courts. Moreover, as the Second Circuit itself has recognized, application of the *Daye* rule often requires "minute retrospective dissection of state court proceedings" to determine if the state court was fairly alerted to a federal constitutional claim that the defendant did not explicitly identify. *Petrucelli v. Coombe*, 735 F.2d 684, 689-90 (2d Cir. 1984) (citation omitted). The rule of *Daye* thus unnecessarily complicates the litigation and determination of exhaustion issues, and therefore is unwieldly as well as incorrect.

In this case, the defendant asserted on his state appeal the state-law claim that preclusion of the alibi witness was an abuse of the discretion conferred on the trial court by New York Crim. Proc. Law (CPL) § 250.20. That state statutory

claim differs from the defendant's claim in his habeas petition that the preclusion violated the federal Constitution. Indeed, in some cases appellate courts have expressly limited their analysis of the preclusion of alibi testimony solely to a determination that the trial court did not abuse its discretion, precisely because, as in this case, the parties did not explore the separate question of the constitutionality of the preclusion. *United States v. White*, 583 F.2d 899, 901 & n.3 (6th Cir. 1978); *United States v. Barron*, 575 F.2d 752, 757 n.5 (9th Cir. 1978); *Clark v. United States*, 396 A.2d 997, 999 n.6 (D.C. 1979); *see also Fendler v. Goldsmith*, 728 F.2d 1181, 1188 (9th Cir. 1984) (application of abuse of discretion test to determine propriety of preclusion order merely "assumes the constitutionality of the order").

In his state court brief, the defendant discussed five out-of-state cases that construed analogous statutes to "indicate the circumstances under which appellate courts have considered preclusion to be an abuse of discretion" (Brief at 43). Although the defendant in the last of those five cases had challenged the constitutionality of precluding alibi testimony pursuant to that state's alibi notice statute, the court in that case had expressly declined to reach that issue, and instead decided the case solely on the ground that the preclusion was an abuse of discretion as a matter of state law. *People v. Merritt*, 396 Mich. 67, 71, 76-77, 238 N.W.2d 31, 32, 35 (1976). Nevertheless, the Second Circuit affirmed the district court holding that the defendant's claim in state court satisfied the *Daye* test by relying on state cases employing constitutional analysis and by asserting the claim in terms that call to mind a specific constitutional right.[8]

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8 In the defendant's state court brief, he noted the *Merritt* court's one-sentence statement that preclusion jeopardizes a defendant's constitutional right to have compulsory process for obtaining witnesses in his favor (Brief at 48), and he cited a New York case that referred to the possible constitutional implications of preclusion. *People v. Morales*, 37 N.Y.2d 262, 333 N.E.2d 339, 372 N.Y.S.2d 25 (1975). These citations were apparently included merely to support the defendant's state statutory claim that preclusion was an abuse of discretion. The fact remains that, in state court, the defendant neither asserted that the

The liberal application of the *Daye* rule in this case is not aberrational, but rather exemplifies the relaxed standard of exhaustion routinely applied in the Second Circuit. For example, in *Gayle v. Scully*, 779 F.2d 802 (2d Cir. 1985), and *Johnson v. Scully*, 727 F.2d 222 (2d Cir. 1984), the Second Circuit found that each defendant had exhausted a claim of unconstitutional judicial bias merely by claiming in state court that the trial judge had deprived him of a fair trial by excessive questioning of witnesses and excessive intervention in the trial. In each case the Second Circuit affirmed the district court's finding that the defendant had satisfied *Daye* by alleging "a factual matrix well within the mainstream of due process adjudication." *Johnson v. Scully*, 81 CV 1863, slip op. at 14 (E.D.N.Y., filed Apr. 27, 1983); *accord Gayle v. Scully*, 82 CV 2883, slip op. at 4 (E.D.N.Y., filed Sept. 14, 1984). This relaxed standard of exhaustion, consistently applied by the Second Circuit, simply eviscerates the exhaustion requirement and leads the federal courts to review state criminal convictions before the state courts have had the opportunity to review the defendants' claims. The rule not only violates important principles of federalism, but also squanders scarce federal judicial resources by invoking federal judicial power to decide issues that may be adequately resolved by the state courts if properly presented to them.

The exhaustion determination of the court below conflicts with this Court's decision in *Anderson v. Harless*, 459 U.S. 4 (1982) (per curiam). In *Anderson* the defendant claimed in his federal habeas petition that an instruction to the jury had unconstitutionally undermined the prosecution's burden of proof. This Court reversed the Sixth Circuit's holding that this claim was properly exhausted in the Michigan state courts. In

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preclusion was unconstitutional, nor cited a single case that addressed the constitutionality of precluding alibi testimony pursuant to a statute that, like CPL § 250.20, comported with the reciprocal discovery requirement of *Wardius v. Oregon*, 412 U.S. 470 (1973). The defendant's citations to *Merritt* and *Morales* thus did not fairly present to the state court a constitutional claim that the defendant never asserted.

state court, the defendant argued that the same instruction was "reversible error," and cited a Michigan case in which the defendant had argued that improper jury instructions violated the federal Constitution. *Id.* at 6. This Court held that the defendant's federal claim was nevertheless unexhausted, because "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made." *Id.* (citations omitted). As in *Anderson*, the defendant in this case never asserted in the state court the constitutional claim later asserted in federal court, but asserted only "a somewhat similar state-law claim," *id.*

In addition, in *Anderson* this Court further stated, "We doubt that a defendant's citation to a state-court decision predicated solely on state law ordinarily will be sufficient to fairly apprise a reviewing court of a potential federal claim merely because the defendant in the *cited* case advanced a federal claim." 459 U.S. at 7 n.3 (emphasis in original). Similarly in this case, the defendant's citation to *Merritt* could not have fairly apprised the New York court that he was asserting a constitutional claim that was not even reached in *Merritt*. Therefore, the exhaustion holding of the court below, and the *Daye* exhaustion standard on which it rests, are at odds with this Court's decision in *Anderson*.

Indeed, the Second Circuit itself has recognized that the exhaustion rule of *Daye* conflicts with this Court's decision in *Anderson*. In *Anderson* this Court cited with approval the Second Circuit decision in *Gayle v. LeFevre*, 613 F.2d 21 (2d Cir. 1980), as support for the holding of *Anderson* that a federal constitutional claim is not exhausted by asserting in state court a "somewhat similar state-law claim." 459 U.S. at 6. Nevertheless, on a subsequent appeal by the same defendant who sought habeas relief in *Gayle v. LeFevre*, the Second Circuit held that *Daye* had "effectively overruled" that decision. *Gayle v. Scully*, 779 F.2d 802, 803-04 (2d Cir. 1985), *cert. denied*, 107 S. Ct. 139 (1986); *see id.* at 813-14 (Oakes, J., dissenting). The rule of *Daye* and its application in this case

thus conflict with the holding of *Anderson*. This conflict warrants the grant of certiorari to review the decision below.

The exhaustion holding of the court below also conflicts with at least three decisions of other federal courts of appeals. In *Santana v. Fenton*, 685 F.2d 71 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983), the defendant had argued on his state appeal that the trial court "abused its discretion in its refusal to permit defendant to testify in his own behalf." *Id.* at 74. The Third Circuit held that this argument was grounded exclusively on state law, and that the defendant therefore had failed to exhaust his claim that the trial court violated his constitutional right to testify. *Id.* In *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450 (7th Cir. 1984), the defendant had argued on his state appeal that the trial court erroneously denied his request for a continuance, and his later request for a new trial, so that he could call additional witnesses. The Seventh Circuit held that this argument "presented an entirely separate legal issue" from the due process claim asserted in the defendant's habeas petition, and that the due process claim was therefore unexhausted. *Id.* at 452-55. Finally, in *Wilks v. Israel*, 627 F.2d 32 (7th Cir.), *cert. denied*, 449 U.S. 1086 (1980), which was cited with approval in *Anderson v. Harless*, 459 U.S. at 6, the defendant had argued on his state appeal that the trial court abused its discretion by refusing to accept his guilty plea. The Seventh Circuit held that this argument, too, presented "a separate legal issue" from the due process claim asserted in federal court, and that the due process claim was therefore unexhausted. 627 F.2d at 37-38. Similarly in this case, the defendant asserted in state court the state law claim that the preclusion of an alibi witness was an abuse of discretion, but asserted in federal court the separate claim that the preclusion was unconstitutional. Nevertheless, while the Third and Seventh Circuits have held, under essentially the same circumstances, that the constitutional claim was unexhausted, the Second Circuit in the case reached a contrary conclusion.

Moreover, the decisions of the federal courts of appeals evince disagreement and uncertainty as to the correctness of the exhaustion rule of *Daye*, which the Second Circuit itself has recognized is a "somewhat more relaxed standard" of exhaustion than the standard previously applied in that circuit. *Johnson v. Scully*, 727 F.2d 222, 224 (2d Cir. 1984). The First and Sixth Circuits have cited *Daye* with approval in cases in which, even under the *Daye* standard, the defendant failed to exhaust his constitutional claim. *Dougan v. Ponte*, 727 F.2d 199, 201-02 (1st Cir. 1984); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987). In another case, however, the First Circuit expressed "doubts" whether the defendant's presentation of a claim in state court exhausted his constitutional claim, even though that presentation "would seem to meet the exhaustion requirements" of *Daye*. *Dyer v. Ponte*, 749 F.2d 84, 86-87 (1st Cir. 1984). The Seventh Circuit has cited *Daye* in a case in which, under the *Daye* standard, the defendant still failed to exhaust his constitutional claim, but that court noted that it might not find exhaustion in some cases even where the defendant satisfied the *Daye* exhaustion rule. *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450, 454-55 & n.9 (7th Cir. 1984). Finally, the Eighth Circuit has described the *Daye* standard as "arguably more lenient" than the exhaustion standard of that circuit, *Martin v. Solem*, 801 F.2d 324, 330-31 (8th Cir. 1986), and in two other cases has expressly refrained from deciding whether *Daye* is consistent with that circuit's exhaustion standard, because in each case the defendant's claim was unexhausted even under *Daye*. *Purnell v. Missouri Department of Corrections*, 753 F.2d 703, 708 (8th Cir. 1985); *Nelson v. Solem*, 714 F.2d 57, 59-60 (8th Cir. 1983).

The exhaustion standard of *Daye* and its application in this case have thus created conflicts among the decisions of the federal courts of appeals, as well as with a decision of this Court. This Court should grant the writ of certiorari to review the judgment below, to resolve these conflicts, and to ensure that the lower federal courts preserve the exhaustion requirement and the federalism interests that it protects.

II. The Decision Below Presents Significant, Recurring, and Unresolved Questions Regarding the Circumstances in Which Preclusion of a Defense Witness is a Constitutional Sanction for a Defendant's Statutory Discovery Violation.

The state trial court in this case precluded the defendant from calling his brother as an alibi witness, because defense counsel, in violation of state statute, inexcusably failed to reveal his intent to call that witness until during the defense case. The court below reversed the order of the district court and held that the preclusion of an alibi witness violated the defendant's sixth amendment right to compulsory process. This case presents an important constitutional question that implicates the state interests in enforcing alibi notice provisions as well as the right of criminal defendants to call witnesses in their defense. This Court has recognized that alibi notice statutes serve legitimate state interests, including enhancement of the truth-finding function of criminal trials and facilitation of orderly, uninterrupted trials. *See Williams v. Florida*, 399 U.S. 78, 81-83, 85-86 (1970); *id.* at 105-06 (Burger, C.J., concurring). This Court has also held that a defendant's right to call witnesses is "a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

The question of whether preclusion is a constitutionally permissible sanction for violation of otherwise valid discovery rules has recurred frequently, and in fact is presented by another case that is pending before this Court. *People v. Taylor*, 141 Ill. App. 3d 839, 491 N.E.2d 3 (1986), *cert. granted*, 107 S. Ct. 947 (1987). This question has been addressed by at least ten state courts of last resort[9] and four

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9 *State v. Smith*, 123 Ariz. 243, 599 P.2d 199, 208-09 (1979); *People v. Hampton*, 696 P.2d 765, 778-79 (Colo. 1985); *State v. Boucino*, 199 Conn. 207, 506 A.2d 125, 130-31 (1986); *State v. Roberts*, 226 Kan. 740, 743-44, 602 P.2d 1355, 1358 (1979); *Taliaferro v. State*, 295 Md. 376, 456 A.2d 29, *cert. denied*, 461 U.S. 948 (1983); *Commonwealth v. Chappee*, 397 Mass. 508, 492 N.E.2d 719, 724-25 (1986), *habeas petition granted*, 659 F. Supp. 1220 (D. Mass. 1987), *appeal pending*, No. 87-1286 (1st Cir.); *State v. Flohr*, 301 N.W.2d 367, 371-73 (N.D.

federal courts of appeals,[10] and is pending in two other federal courts of appeals.[11] In addition, on each of three occasions before certiorari was granted in *Taylor*, three justices of this Court voted to grant certiorari on a case that presented this issue.[12]

Moreover, notwithstanding the grant of certiorari in *Taylor*, certiorari should be granted to review the decision below. First, the State in *Taylor* has argued that this Court should decline to address the merits of the defendant's sixth amendment claim in that case because that claim was not properly presented in the state courts. Brief for Respondent at 15-18, Brief for the United States as Amicus Curiae Supporting Respondent at 8 n.2, *Taylor v. Illinois* (No. 86-5963). Therefore, in the event that this Court declines to reach the merits of the sixth amendment claim in *Taylor*, that case would provide no bar to review of the sixth amendment issue presented here.

In any event, certiorari should be granted in this case even if this Court determines the merits of the claim in *Taylor*, because the analysis of the sixth amendment claim by the court

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1980); *State v. Smith*, 17 Ohio St. 3d 98, 103-04, 477 N.E.2d 1128, 1133-34 (1985); *State v. Mai*, 294 Or. 269, 656 P.2d 315 (1982); *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 138-40, 163 N.W.2d 177, 181-82 (1968).

10 *Escalera v. Coombe*, No. 87-2123 (2d Cir. Aug. 13, 1987); *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981); *United States ex rel. Enoch v. Hartigan*, 768 F.2d 161 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1281 (1986); *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1984).

11 *Chappee v. Massachusetts*, 659 F. Supp. 1220 (D. Mass 1987), *appeal pending*, No. 87-1286 (1st Cir.); *Braunskill v. Hilton*, 629 F. Supp. 511 (D.N.J. 1986), *appeal pending* (3d Cir.).

12 *Lane v. Enoch*, 106 S. Ct. 1281 (1986) (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting from denial of certiorari); *Smith v. Jago*, 470 U.S. 1060 (1985) (White, J., joined by Burger, C.J., and Brennan, J., dissenting from denial of certiorari); *Taliaferro v. Maryland*, 461 U.S. 948 (1983) (White, J., joined by Brennan and Blackmun, JJ., dissenting from denial of certiorari).

below is fundamentally wrong. The court below correctly found that defense counsel offered "no reasonable explanation" for his violation of the alibi notice statute. Appendix at 6a. Indeed, counsel's service of a pretrial notice that omitted the defendant's brother from the witness list, in conjunction with the extreme lateness of counsel's eventual disclosure of his intent to call the brother, suggest that counsel's failure to give timely notice was intentional as well as inexcusable. The court below nevertheless held that even an attorney's intentional failure to comply with the statutory notice requirement can not justify preclusion, absent evidence that the defendant himself was personally responsible for the noncompliance. *Id.* at 12a. This arbitrary severance of defendants from the conduct of their attorneys will simply encourage defense attorneys to seek the tactical advantages of calling surprise alibi witnesses with impunity, and will rob the State of its ability to enforce its notice requirements effectively. This holding of the court below is therefore unreasonable, and is contrary to the settled principle that, "absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel." *Reed v. Ross*, 468 U.S. 1, 13 (1984) (citations omitted).

In addition, the court below incorrectly concluded that "the potential for prejudice to the prosecution could have been eliminated by a brief trial continuance," Appendix at 13a, and concluded that the preclusion was unconstitutional because there was no "demonstration of substantial prejudice to the prosecution's case," *id.* at 18a. This analysis fails to recognize that substantial prejudice to the State inheres whenever a surprise witness is first revealed during the defense case, because a brief continuance at that point permits the State to conduct only a cursory investigation, and at the same time allows the State's already-completed case to fade from memory. Therefore, while the court below nominally employed an analysis that balanced the defendant's interest in calling the surprise witness against the State's interest in precluding him, the court's requirements of "evidence of complicity" by the defendant and "demonstration of substantial prejudice" to the

State amount to a holding that preclusion is virtually never constitutional.

The petition for certiorari therefore should be granted so that this Court can properly decide the significant and recurring sixth amendment question presented by this case.[13]

III. The Court Below Erroneously Concluded that the State Trial Court's Decision to Admit Identification Testimony was Incorrect Merely Because the State Court Did Not Expressly Set Out All of the Factual Findings Underlying its Decision.

After a full evidentiary hearing at which the state trial court heard the testimony of both identifying witnesses and of the detective assigned to this case, the court concluded that each witness's in-court identification was based on his independent recollection of the crime and not on any suggestive pretrial identification. The court therefore denied the defendant's motion to suppress the testimony of each eyewitness identifying the defendant in court as the gunman. The state trial court set out in detail the factual findings underlying its decision on the suppression motion (H. 164-69), but the court below found that the state court's decision contained a "conspicuous absence" of the facts regarding the photographic identification at the police station described by both civilian witnesses in their hearing testimony. Appendix at 16a. The court below therefore held that the court "lacked the necessary clear and convincing evidence to support its conclusion that the in-court identification was the product of independent recollection." *Id.* This conclusion of the court below is wrong, and evinces a failure to accord the proper standard of deference to the state court's determination that the identification testimony was admissible.

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13 Even if this Court reaches the merits of the sixth amendment issue in *Taylor v. Illinois*, the flawed analysis of the decision below would at least warrant the remand of this case for reconsideration in light of *Taylor*.

A state court deciding a motion to suppress evidence need not, in order for its decision to withstand federal habeas corpus review, state every finding of fact on the record "in infinite detail and clarity." *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 107 S. Ct. 228 (1986); *see Marshall v. Lonberger*, 459 U.S. 422, 432-34 (1983); *LaVallee v. Delle Rose*, 410 U.S. 690 (1973) (per curiam); *Townsend v. Sain*, 372 U.S. 293, 314-15 (1963). Rather, a federal court should ordinarily assume that the state court applied the correct standard of federal law in the absence of evidence to the contrary, and that the state court implicitly found the facts that are consistent with its legal conclusion. *Marshall v. Lonberger*, 459 U.S. at 433-34; *LaVallee v. Delle Rose*, 410 U.S. at 694-95; *Townsend v. Sain*, 372 U.S. at 314-15.

There is no basis whatever to doubt that the state court in this case applied the correct standard of federal law in determining that the identification testimony was admissible. First, the federal standard for determining the constitutionality of admitting a witness's in-court identification testimony is clear. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *United States v. Wade*, 388 U.S. 218, 240 (1967). Second, the record affirmatively shows that the state court applied the correct federal standard. The court correctly described the issue at the hearing as whether the "in-court identification will be admissible at the trial or whether the in-court identification of both witnesses should be excluded because of some improper or suggestive procedures that may have preceded the in-court identification made at this hearing" (H. 165). In addition, the court expressly referred to *Wade* to support its conclusion that the corporeal showup identification of the defendant was "highly irregular and improper" (H. 166-67, 168). Finally, the court expressly found that each witness's in-court identification "was based upon his own independent recollection" (H. 167, 169). The record thus leaves no doubt that the state court's determination of the suppression motion rested on application of the correct federal standard. *See LaVallee v. Delle Rose*, 410 U.S. at 694-95.

Accordingly, the court below should have assumed that the state court implicitly found facts regarding the photographic identification at the police station that, evaluated in light of the correct legal standard, led the state court to deny the defendant's suppression motion. The record fully supported a finding that, even if the photographic identification occurred, it was not so suggestive as to undermine the reliability of the in-court identification.[14] The court below nevertheless concluded that a new suppression hearing is required merely because the state trial court did not expressly state all of the relevant factual findings underlying its decision.[15] This conclusion of the court below is erroneous. Therefore, certiorari should be granted to correct this conclusion and to clarify the proper standard of deference to which a state court's determination of a suppression motion is entitled on federal habeas corpus review.

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14 The district court concluded that the state court had implicitly found that no such photographic identification occurred at all. 652 F. Supp. at 1325 n.9, Appendix at 34a n.9. The court of appeals then concluded that such a finding by the state court would not be fairly supported by the record. Appendix at 14a-15a. On that view, however, the Second Circuit should have reversed the federal district court, and not the state trial and appellate courts. The Second Circuit should have simply rejected the district court's conclusion that the state court implicitly made findings that the Second Circuit regarded as unsupportable, and should have instead concluded that the state court found that the photographic identification occurred but did not taint the in-court identification. That finding is amply supported by the record, and fully justifies the state court's decision to admit the identification testimony.

15 Thus, if a new suppression hearing were conducted in accordance with the order of the court below, at that hearing the state trial court would merely have to specify, on the basis of evidence already in the record, its factual findings regarding the photographic identification. The state court would then determine if those express factual findings alter its determination of the suppression motion. In light of the ample support for the state court's original determination of the motion, there is little reason to doubt that the State would prevail at such a hearing.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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October 3, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1216—August Term, 1986

(Argued June 18, 1987 Decided August 13, 1987)

Docket No. 87-2123

ROBERT ESCALERA,

Plaintiff-Appellant,

—v.—

PHILIP COOMBE, Superintendent of Eastern Correctional Facility,

Defendant-Appellee.

Before:

OAKES, MESKILL and PRATT,

Circuit Judges.

Robert Escalera appeals from a judgment of the United States District Court for the Eastern District of New York, Glasser, *J.*, dismissing his petition for a writ of habeas corpus. Escalera was convicted of felony murder after a jury trial in the New York Supreme Court. Held:

Escalera exhausted his habeas claims before the New York courts; the trial court's preclusion of his important alibi witness solely as a sanction for violation of New York's alibi notice statute, N.Y. Crim. Proc. Law § 250.20, absent a show-

ing of substantial prejudice to the prosecution's case, violated Escalera's rights under the Sixth and Fourteenth Amendments; and the district court erred in failing to determine the sufficiency of evidence concerning the reliability of in-court eyewitness identification testimony under *United States* v. *Wade*, 388 U.S. 218 (1967).

Reversed.

PETER J. AVENIA, New York City (Gombiner & Avenia, New York City, of counsel), *for Appellant.*

LEONARD JOBLOVE, Assistant District Attorney, Kings County, Brooklyn, New York (Elizabeth Holtzman, District Attorney for Kings County, Barbara D. Underwood, Assistant District Attorney, Kings County, Brooklyn, New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

New York state prisoner Robert Escalera appeals from a judgment entered by the United States District Court for the Eastern District of New York, Glasser, *J.*, dismissing his habeas corpus petition. The court determined that the petition presented substantial questions for appellate review and issued a certificate of probable cause in accordance with Fed. R. App. P. 22(b).

We hold that the nature and presentation of Escalera's state appellate brief was adequate to alert the New York state courts to the constitutional basis of his argument and that his claim was, therefore, exhausted. We also conclude that the state trial court's preclusion of an important alibi witness solely as a sanction for non-compliance with New York's alibi notice statute, N.Y. Crim. Proc. Law § 250.20 (McKinney 1982),

absent a showing of substantial prejudice to the prosecution's case, violated Escalera's rights under the Sixth and Fourteenth Amendments. Finally, we hold that the district court erred in failing to review the sufficiency of evidentiary support for the state court's ultimate conclusion that an in-court eyewitness identification was reliable under *United States* v. *Wade*, 388 U.S. 218 (1967), and was therefore admissible.

The judgment of the district court is reversed and the case is remanded with a direction to grant the petition for a writ of habeas corpus unless the state conducts a new *Wade* hearing and grants Escalera a new trial within sixty days.

BACKGROUND

On August 18, 1975, Jesus Cordero was walking in Fort Greene Park in Brooklyn with his friends Pasquale Nieves and Felix Torres. At approximately 6:30 p.m., the group was approached by four men who announced a holdup. One of the robbers shot Cordero in the chest, and all four robbers fled the scene.

Five days later Cordero died from the gunshot wound. By that time, witnesses Nieves and Torres had already viewed photographs of potential suspects at the police station. Tr. 176. They later testified that they both had selected Robert Escalera's photograph at this initial viewing as that of the gunman. H. 88-94, 133-137 (*Wade* hearing), Tr. 155-56 (trial).

On September 3, Detective Harold Ruger, who was assigned to the case after the initial viewing, showed Nieves and Torres, independently, an array of eight photographs. No identification was made. On September 28, Ruger added to the original array photographs of Robert Escalera and another suspect. Nieves and Torres, independently, again selected Escalera's photograph as that of the man who shot Cordero. Both witnesses later testified that Ruger's photograph of Escalera was the same one that they had picked out at the police station shortly after the shooting. H. 93, 139, Tr. 155. Escalera was immediately brought to the police station, and Ruger brought

the two witnesses, together, to see him. Nieves and Torres, together, observed Escalera, alone, through a one-way mirror and confirmed that he was the gunman. Ruger testified that both Nieves and Torres claimed to have seen the gunman some time prior to the shooting, Tr. 204, and Torres confirmed that on five, six or seven occasions Escalera had visited the frankfurter stand where Torres worked one to two years before the shooting.

The state trial court, and the district court in its habeas review, correctly noted that a one person showup of the sort conducted by Ruger, in which to witnesses jointly view the suspect, is suggestive enough to require further inquiry into the reliability of any subsequent in-court identification. *See Stovall* v. *Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."); *Wade*, 388 U.S. at 234 (joint viewing of lineup is fraught with dangers of suggestion). The state's brief on this appeal does not contest the state court's ruling that the showup was suggestive.

Before beginning Escalera's trial for felony murder, Justice Corso of the New York Supreme Court conducted a *Wade* hearing to determine whether the proffered in-court identification testimony of Nieves and Torres was sufficiently reliable to be admitted, despite the suggestive police station showup. Justice Corso heard testimony from the two witnesses and Ruger and concluded that the in-court identifications were based on independent recollections and were not influenced by the suggestive showup or the properly conducted photographic identification made on September 28. J. App. at 131-33. Although both Nieves and Torres testified that they had picked out Escalera's photograph at the police station, Justice Corso did not refer to that viewing. Rather, he explicitly ruled that the suggestive showup occurred only after the non-suggestive September 28 photographic identification and that Torres had seen Escalera on several occasions prior to the shooting. *Id.* Torres' testimony, however, suggests that the initial identification may have resulted from a joint viewing of an array of photographs never submitted to the trial court and from Torres' selection of

a photograph for Nieves' approval. H. 135-36, Tr. 155-56. Such an uncontrolled, joint selection, if it took place, would render the photographic identification suspect. *See Styers* v. *Smith*, 659 F.2d 293, 297-98 (2d Cir. 1981).

Escalera's trial consumed two days of testimony. Nieves and Torres described the events in the park and identified Escalera as the gunman. The sole evidence linking Escalera to the shooting was the identification testimony of Nieves and Torres. Detective Ruger confirmed that, according to police records, the witnesses had viewed photographs at the police station and that he knew of the viewing during his investigation. Tr. 175-76. He testified that he did not know that that initial viewing resulted in an identification of Escalera because he was not present at the initial viewing. Tr. 176. Torres repeated the testimony that he gave at the *Wade* hearing regarding the initial joint viewing and selection of Escalera's photograph. Tr. 155-57.

Escalera's defense concentrated on discrediting the identification, particularly by pointing our differences between the witnesses' description of the gunman immediately after the shooting and their later in-court descriptions and identifications. Escalera testified in his own behalf and claimed that he had met his friend Samuel Gonzalez at a bus stop at 5:30 p.m. on the day of the shooting and remained with him until 7:30 p.m., except for the period from 6:00 to 6:30 p.m., during which Escalera was at home eating and showering. Tr. 228-30. Gonzalez also testified that he had been with Escalera except for the half-hour period at issue here. *Id.* at 272-74.

After the state completed its presentation and after one defense witness finished testifying, Escalera's counsel requested leave to call Escalera's brother, Peter Escalera, to testify that Escalera was at home during the half-hour period not covered by Gonzelez's testimony, 6:00 to 6:30 p.m. Peter was not on the list of alibi witnesses that Escalera's attorney had provided to the prosecutor before trial in accordance with New York's alibi notice statute, N.Y. Crim. Proc. Law

§ 250.20.[1] Escalera's counsel offered the court no reasonable explanation for this failure.

The prosecuting district attorney expressed surprise at the request and asked "that the witness be precluded and that I be given ample opportunity to examine [Peter] with a stenographer present." Tr. 233. Justice Corso precluded the witness based on the discretion granted to him in section 250.20(3), the lack of explanation for the late request, the likelihood that the jury would discredit testimony produced so late in the trial and the adverse impact the testimony and any continuance would have on his anticipated schedule for a pending trial. Tr. 234-35, 291-94.

During its deliberations, the jury asked "to hear the testimony regarding Torres [sic] viewing of photographs . . . at the precinct," Tr. 402, noting that the initial police report "says

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1 The alibi notice statute reads in pertinent part, as it did at the time of the trial:

> 1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy there of with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for service of the notice.
>
> . . . .
>
> 3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

N.Y. Crim. Proc. Law § 250.20 (McKinney 1982).

that Torres viewed photographs at the precinct." Tr. 403. In response, unspecified testimony was read to the jury.

The jury found Escalera guilty of felony murder and he was sentenced to fifteen years to life inprisonment. The Appellate Division affirmed the conviction by memorandum decision, 61 A.D.2d 890, 402 N.Y.S.2d 700 (2d Dep't), *leave to appeal denied*, 408 N.Y.S.2d 1032 (1978).

Escalera's petition for a writ of habeas corpus raised the two issues that he repeats here. He claims that the preclusion of his alibi witness violated his Sixth Amendment right to compulsory process and that the in-court identification was so tainted by the pre-trial procedures that suppression was required. The district court first reviewed Escalera's brief to the Appellate Division and found that its references to "the fundamental and important constitutional right of a defendant to have compulsory process" and its citation to cases employing constitutional analysis satisfied the exhaustion test articulated in *Daye* v. *Attorney General of the State of New York*, 696 F.2d 186, 194 (2d Cir. 1982) (in banc), *cert. denied*, 464 U.S. 1048 (1984).

Moving to the merits, the district judge noted that neither we nor the United States Supreme Court has ever decided whether preclusion is a constitutionally permissible sanction for substantial failure to comply with an alibi notice statute. He concluded that there is a rebuttable presumption under the Sixth Amendment against preclusion, but that the state overcame the presumption by proving that:

(1) The surprise to the state was substantial;

(2) sanctions less severe than preclusion would have been ineffective;

(3) the proffered testimony might have been material to the outcome of the trial but was not as crucial as the alibi testimony of Gonzalez, and the jury was likely to discount the testimony of Escalera's brother;

(4) there was obvious potential for prejudice to the state's case, despite lack of specific discussion of prejudice by the prosecutor; and

(5) there was no good excuse for the late notice.

The district court also rejected Escalera's challenge to the eyewitness identification procedures. Applying the test of reliability outlined in *Neil* v. *Biggers*, 409 U.S. 188 (1972), the court concluded that the in-court identification was reliable despite the suggestive showup because:

(1) both Nieves and Torres had ample opportunity to observe the gunman during the events in the park;

(2) as victims of a holdup, they had every reason to be attentive;

(3) the apparent inaccuracies in the prior descriptions of the gunman, particularly as to race, were largely due to semantic difficulties;

(4) although the level of certainty demonstrated at the highly suggestive showup proved nothing, the independent selection of Escalera's photograph from the nonsuggestive arrays presented on September 3 and 28 showed a persuasive level of certainty;

(5) although the six weeks between the crime and the September 28 photographic identification would otherwise be quite important, the other *Biggers* factors militated in favor of admissibility;

(6) Torres' delay in reporting having seen Escalera prior to the shooting deprives his testimony of much weight; and

(7) "it is crucial that the showup *followed* an untainted photographic identification."

J. App. at 29.

The court dismissed Escalera's petition but issued a certificate of probable cause to appeal.

DISCUSSION

A. *Exhaustion*

The state has renewed its argument that Escalera's witness preclusion claim was not exhausted in the state courts because it was never phrased in Sixth Amendment terms. In *Daye*, we reaffirmed the general principle that "[a] defendant may, however, fairly present the substance of a federal constitutional claim to the state court without citing 'book and verse on the federal constitution,' " as long as "the nature or presentation of the claim [was] likely to alert the court to the claim's federal nature." 696 F.2d at 192 (quoting *Picard* v. *Connor*, 404 U.S. 270, 278 (1971)). After reviewing Escalera's brief to the New York Appellate Division, we conclude that the nature and the presentation of the claim, considered together, were sufficient to direct the court's attention to the Sixth Amendment.

B. *Witness Preclusion Sanction*

The United States Supreme Court has not addressed the question of whether preclusion is a constitutionally permissible sanction for violation of an otherwise valid alibi notice statute such as New York's section 250.20. *Wardius* v. *Oregon*, 412 U.S. 470, 472 n.4 (1973) (constitutionality of sanction not reached because Oregon statute was facially invalid for failing to provide defendant with reciprocal discovery of alibi rebuttal witnesses); *Williams* v. *Florida*, 399 U.S. 78, 83 n.14 (1970) (validity of sanction not reached because defendant complied with otherwise valid alibi notice statute).

The Fifth Circuit has concluded that "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." *United States* v. *Davis*, 639 F.2d 239, 243 (5th Cir. 1981) (failure to list witnesses' names pursuant to pre-trial discovery order). The Seventh Circuit, on the other hand, has employed a balancing test to decide whether preclusion was permitted under the Sixth Amendment to enforce a discovery rule requiring notice of

defense witnesses. *United States ex rel. Enoch* v. *Hartigan*, 768 F.2d 161 (7th Cir. 1985), *cert. denied sub nom. Lane* v. *United States ex rel. Enoch*, 54 U.S.L.W. 3580 (U.S. Mar. 3, 1986). The *Enoch* Court concluded that the state's interest in applying discovery rules was not substantial enough to override the Sixth Amendment right to present "clearly material testimony." *Id.* at 163. It found that the state had failed to specify what prejudice it had suffered due to the defendant's non-compliance. *Id.* It also considered the lack of evidence of bad faith and the trial court's failure to consider less severe sanctions available to it. *Id.*

In *Ronson* v. *Commissioner*, 604 F.2d 176 (2d Cir. 1979), we considered a trial judge's decision to preclude a defense of insanity because of a defendant's failure strictly to comply with New York's procedural rule, N.Y. Crim. Proc. Law § 250.10 (McKinney 1982 & Supp. 1987) (amended 1984), requiring formal notice of intention to raise such a defense. Noting that "maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal," *Ronson*, 604 F.2d at 178, we balanced the defendant's interest in presenting his "crucial" claim against the state's legitimate interest in conducting the prosecution without the substantial prejudice that might follow the last minute introduction of an insanity defense. *Id.* at 179.

We concluded in *Ronson* that the prosecution had been given informal but fair notice of the defense and that any prejudice to the prosecution's case could have been alleviated by appropriate trial management. Accordingly, we held that the decision to preclude the defense violated the defendant's Sixth Amendment rights. *Id.* at 178-79. *See also United States* v. *Duggan*, 743 F.2d 59, 82 n.8 (2d Cir. 1984) (constitutional right to call witnesses limited to testimony that is "relevant, material and vital to the defense;" preclusion of insanity defense held proper absent showing of materiality and vitality).

1. *State Interest in Precluding Alibi Witness Testimony*

The fundamental interests of a criminal defendant seeking to establish an alibi defense and those of the state in precluding belated introduction of an unexpected alibi witness are sub-

stantially the same as the interests balanced in *Ronson*. The respective statutory notice provisions are remarkably similar. *Compare* N.Y. Crim. Proc. Law § 250.20 (alibi witness notice) *with* § 250.10 (insanity defense notice). The features that distinguish the alibi defense from the insanity defense are the ease of fabrication of the former, *see Williams*, 399 U.S. at 81 ("Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate."); *People* v. *Rakiec*, 289 N.Y. 306, 308, 45 N.E.2d 812 (1942) (alibi notice statute affords state an opportunity to investigate possibly false alibi testimony), and the state's need for expert psychiatric examination and testimony regarding the latter, *see Ronson*, 604 F.2d at 179 (state's failure to prepare case and medical evaluation due to surprise insanity defense was a "disadvantage" that could be dealt with by granting a continuance). Therefore, the weighing of the prejudice to the prosecution's case against the defendant's need for the alibi testimony must take into account the state's reduced ability to detect and expose false testimony. *See Fendler* v. *Goldsmith*, 728 F.2d 1181 (9th Cir. 1984) (preclusion sanction under general discovery rules unconstitutional as applied; conclusion not applicable to alibi notice rule "because of the special tendency of unexpected alibi defenses to cause unfair surprise and lengthy trial delays," *id.* at 1188 n.12, 1190 n.19).

Under the facts of this case we conclude that the state's interest in the truthful testimony of Peter Escalera could have been accommodated by a continuance as requested by the prosecuting district attorney to permit examination of Peter in the presence of a stenographer. The mere fact of surprise in the introduction of a witness to fill the gap in a previously announced alibi defense is not in itself prejudicial to the prosecution's case where, as here, it can be easily remedied.

The state also has a further interest, however, in systematically and prospectively deterring fabricated alibi testimony. This interest goes beyond punishing " 'mere technical errors or omissions,' " *cf. Enoch*, 768 F.2d at 163 (quoting *Alicea* v. *Gagnon*, 675 F.2d 913, 924 (7th Cir. 1982)), and, where backed

by statute, may implicate an overriding policy designed to protect the integrity of the evidence, *cf. Davis*, 639 F.2d at 243 (alibi notice required by discovery orders of court designed only to prevent surprise and not to protect integrity of evidence because no "overriding policy" involved). It is this interest in prospective deterrence which has prompted courts to consider whether the lack of notice was a result of bad faith by the defendant, *see Enoch*, 768 F.2d at 163 (no evidence of bad faith), or his attorney, *see Ronson*, 604 F.2d at 179 (no intent by counsel to hide insanity issue), and whether there were available effective deterrent sanctions short of preclusion, *see Enoch*, 768 F.2d at 163 (less severe sanctions available but not considered by trial judge).

We need not address Escalera's personal bad faith in this respect because there was no evidence of culpability on his part in the failure to comply with the alibi notice statute.[2] Nor can we conclude that the state's interest in deterrence requires the bad faith of a defense attorney to be imputed to his client. In reaching this result, we are not unmindful that defendants may be bound by the errors of their attorneys, but we rely on the Supreme Court's proscription against "mechanistically" applying even such state rules as are designed to ensure fairness and reliability in ascertaining guilt or innocence. *See Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973). We believe that "[a]bsent evidence of complicity, it is unreasonable to deprive a defendant of his right to present a defense, a right guaranteed to him by the Constitution of the United States, even if his attorney intentionally failed to timely provide a list of defense witnesses to the prosecution as required by the . . . rules of criminal procedure." *Chappee* v. *Commonwealth of Massachusetts*, 659 F. Supp. 1220, 1225 (D. Mass. 1987) (applying balancing test to decide that exclusion of expert witness violated Sixth Amendment rights of defendant). Finally, the statute at issue does not

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2 Although the district judge concluded that "Escalera's apparent bad faith—or, at least, the absence of a good excuse—is evident in the very lateness of the notice," his ensuing discussion confirms that any bad faith resided in the defense attorney's apparent change in trial strategy and that the court did not hold Escalera personally responsible. *See* J. App. at19-20.

provide a less severe sanction for the trial court's consideration.

2. *Balancing Test*

The weight afforded to the factors relevant to preclusion is left to the sound discretion of the trial judge, based on evidence in the record and supported by appropriate findings of fact. Although unreasonable demands on the court's schedule may be relevant to the availability of an effective cure for the putative prejudice to the prosecution, the state trial judge's error lay in failing to consider the remaining relevant factors. Except for its consideration of bad faith in the attorney's noncompliance, the district court's conclusions were properly addressed to the relevant factors, but, as discussed *infra*, were insufficient or unsupported by the evidence in certain vital areas.

The district court concluded that Peter's alibi testimony "might have been material to the outcome of the trial, since his testimony would have covered a time period that did not entirely overlap that to which Samuel Gonzalez testified." This was an understatement. *See Fendler*, 728 F.2d at 1189-90 & n.14 (proffered testimony "could have been of substantial importance;" state appellate court found that testimony "might have been relevant" to defense; preclusion ruled impermissible). Peter's testimony would have filled a critical time lapse in Escalera's alibi. There simply is nothing more material to Escalera's guilt or innocence than the evidence of his whereabouts during the thirty minutes immediately preceding the crime. The precluded testimony was "relevant, material and vital" to establishing Escalera's alibi. *See Duggan*, 743 F.2d at 82 n.8.

Moreover, the district court found that, although the prosecutor did not specifically discuss prejudice to his case, there was "substantial surprise" and an "obvious potential for prejudice." J. App. at 19. It is quite clear that the potential for prejudice to the prosecution could have been eliminated by a brief trial continuance. *Cf. Ronson*, 604 F.2d at 179 (continu-

ance would alleviate state's disadvantage). In fact, a continuance with an opportunity to interview Peter in the presence of a court stenographer was all that the prosecution sought.

Based on the court's conclusion that any prejudice to the prosecution was only potential and that the impact of preclusion on Escalera's defense would have affected the outcome depending on the jury's assessment of Peter's testimony, we conclude that the preclusion of the alibi witness violated Escalera's Sixth Amendment compulsory process right as applied to the states by the Fourteenth Amendment.

C. *Identification Testimony*

To overcome the presumption that the trial court's factual findings were correct as to the reliability of the in-court identification, Escalera has submitted to the district court and to us the "part of the record of the State court proceeding in which the determination" was made. *See* 28 U.S.C. § 2254(d)(8) (1982) (exception to presumption of correctness). We conclude that the record does not fairly support the factual determinations underlying the trial court's reliability conclusion and that the district court was therefore required to conduct an evidentiary hearing into the disputed finding.

Following the preliminary *Wade* hearing, Justice Corso found that both Nieves' and Torres' in-court identifications were based on their own independent recollections, not unduly influenced by the highly suggestive showup or by the photographic identifications on September 28. J. App. at 131-33. He determined that the photographic identifications were not suggestive either in the manner in which they were conducted or in the specific content of the photographic arrays presented on September 3 and 28. *Id.*

Justice Corso heard both witnesses testify with particularity that they viewed photographs of suspects at the police station shortly after the shooting, J. App. at 91, 116, that police were not present in the room during the viewing, *id.* at 94, 117, and that the witnesses identified a photograph of Escalera at that time, *id.* at 94, 118. Our review of the full record of the *Wade*

hearing confirms that there was no contrary testimony,[3] and that the only inconsistency between the witnesses' testimony was whether they were together or alone when they identified the photograph. Subsequent trial testimony and evidence confirms that the initial viewing of photographs in fact occurred. An uncontrolled, joint selection, if it occurred, would render the initial photographic identification suspect. *See Styers*, 659 F.2d at 297-98. Thus, the testimony clearly raised substantial questions as to the suggestiveness of the initial viewing. Moreover, there is no explanation for the apparent five week delay between the witnesses' alleged initial identification and the final September 28 identification. The lapse suggests a lack of certainty in the identification that might controvert the district court's conclusion in its *Biggers* review that there was "persuasive" certainty. *See* J. App. at 28.

The court did not investigate the implications of the initial photographic viewing because it concluded that it must defer under 28 U.S.C. § 2254(d) to the state court's implicit finding that the initial viewing did not occur. *See* J. App. at 31 n.9. We disagree.

In matters of historical fact, a federal habeas court is bound to defer to the findings of the state court after the state court has conducted a full and fair hearing at which the material facts were adequately developed, "unless the federal court concludes that the record as a whole does not fairly support the state court's factual determination." *Matusiak* v. *Kelly*, 786 F.2d 536, 543 (2d Cir.) (citing 28 U.S.C. § 2254(d)(3) and (8)), *cert. dismissed*, 55 U.S.L.W. 3237 (U.S. Oct. 6, 1986). This standard, as applied to the mixed questions of law and fact that make up the reliability test of *Biggers*, requires the district

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3 At one point in the trial Detective Ruger responded, "That's correct," to the question, "Now, your testimony that the first time that either Mr. Torres or Mr. Nieves identified a photograph of Escalera was on September 28; is that right?" Tr. 188. We note that this testimony was in the context of exploring Ruger's procedures, not directed to the initial photographic viewing. Ruger had already testified that the initial viewing had taken place, but that he had not been present and was not told of an early identification. *Id.* at 176-77.

court to review subsidiary questions of historical fact to the extent disputed in the habeas petition to ensure the existence of evidentiary support in the state court record. *Dickerson* v. *Fogg*, 692 F.2d 238, 243 (2d Cir. 1982).

The district court erred in summarily deferring to the trial court's unstated conclusion that the initial photographic viewing did not occur. Although the district court suggested that the trial court merely credited Ruger's story rather than that of the two witnesses, the record discloses that Ruger confirmed the occurrence of the initial viewing and never denied that the first identification took place. Because, as the district court decision clearly states, "it is crucial that the showup *followed* an untainted photographic identification," J. App. at 29, it was equally crucial that the court confirm the timing and rule out any possible tainting of the photographic identification. *See Richmond* v. *Ricketts*, 774 F.2d 957, 961-62 (9th Cir. 1985) (district court must review sufficiency of state court findings of fact to determine whether presumption of correctness applies or evidentiary hearing is required); *Montes* v. *Jenkins*, 581 F.2d 609, 612 (7th Cir. 1978) ("because the petitions . . . allege facts which contradict the [state court's] description of the relevant facts, it was incumbent upon the district court to ascertain by a review of the pertinent parts of the state court record whether the factual determination was fairly supported by that record, or whether an evidentiary hearing was necessary").

In this case there is a conspicuous absence from the trial court decision of the crucial facts regarding the initial photographic viewing and identification. Our review of the record indicates most convincingly that the viewing, at least, took place and that an identification may have occurred under suggestive circumstances. We therefore hold that the trial court lacked the necessary clear and convincing evidence to support its conclusion that the in-court identification was the product of independent recollection. Under the circumstances, the district court was required to conduct an evidentiary hearing on the occurrence and effect of the initial viewing, and its failure to do so was error.

D. *Harmless Error*

Finally, assuming without deciding that the errors are subject to harmless error analysis, we consider whether the preclusion sanction or use of potentially unreliable in-court identification testimony was harmless beyond a reasonable doubt. *See Chapman* v. *California*, 386 U.S. 18 (1967). We look to the " 'probable impact of the [errors] on the minds of an average jury' " to determine " 'whether there is a reasonable possibility' that the error affected the jury's verdict." *Alicea*, 675 F.2d at 925 (quoting *Allison* v. *Gray*, 603 F.2d 633, 634 (7th Cir. 1979)).

The proffered and precluded testimony of Peter Escalera was highly relevant to Escalera's assertion that he was home during the thirty minutes prior to the shooting. Peter's testimony concerning this time period presumably would have corroborated his brother's otherwise unsupported alibi. The jury might discount the testimony of a close relative, but the possibility that Peter's testimony would affect the verdict is not unreasonable. We note with some surprise the state's citation for its contrary contention. It cites *United States* v. *Smith*, 524 F.2d 1288, 1291 (D.C. Cir. 1975), which states, "In view of the solid identification evidence, it seems most unlikely that the alibi testimony of relatives would have raised a doubt in the minds of the jury." In Escalera's case, the identification testimony was anything but solid.

Moreover, we cannot conclude that admission of Nieves' and Torres' identification of Escalera was harmless beyond a reasonable doubt. Their testimony was the sole evidence linking Escalera to the crime. The state simply had no case without it, and its erroneous admission would be extremely harmful. *See Dickerson*, 692 F.2d at 247 (erroneous admission of identification not harmless, even though robbery defendant also was found in non-exclusive possession of stolen goods).

CONCLUSION

Preclusion of an important defense witness solely as a sanction for failure to comply with New York's alibi notice statute was constitutionally impermissible absent a demonstration of substantial prejudice to the prosecution's case.

As to the identification issue, the district court erred in failing to conduct an evidentiary hearing on the disputed facts surrounding the initial photographic viewing and identification. Although such error would normally entail a remand to the district court, the circumstances of this appeal favor resolution of the unresolved identification issues by the state courts if the state elects to re-try Escalera.

The judgment of the district court is reversed and the case is remanded to the district court with a direction to grant the petition for a writ of habeas corpus unless the state conducts a new *Wade* hearing and grants Escalera a new trial within sixty days.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT ESCALERA,

Petitioner,

—against—

PHILIP COOMBE, Superintendent of Eastern Correctional Facility,

Respondent.

85 Civ. 1698

PETER J. AVENIA, Gombiner and Avenia, New York City for petitioner.

LEONARD JOBLOVE, Asst. Dist. Atty., (Elizabeth Holtzman, Dist. Atty., and Barbara D. Underwood and Peter A. Weinstein, Asst. Dist. Attys., of counsel), Brooklyn, N.Y., for respondent.

MEMORANDUM AND ORDER

GLASSER, District Judge:

Petitioner Robert Escalera is serving a sentence of fifteen years to life upon his conviction of felony murder in violation of N.Y. Penal Law §§ 125.25(3) (McKinney 1975). After the judgment of conviction was entered on September 24, 1976, the appellate division affirmed Escalera's conviction on February 27, 1978, 61 A.D.2d 890, 402 N.Y.S.2d 700. On June 9, 1978, Escalera was denied leave to appeal to the New York Court of Appeals. The trial court denied Escalera's motion to vacate the judgment, N.Y. Crim. Proc. Law § 440.10 (McKin-

ney 1983), on August 3, 1981. This petition for a writ of habeas corpus, 28 U.S.C. § 2254, followed.

The petition raises two arguments. First, Escalera contends that the state trial court denied him due process, as well as his sixth amendment right to call witnesses, when it precluded him from calling his brother, Peter Escalera, as an alibi witness. Second, Escalera argues that he was denied due process when the trial court admitted identification testimony that suffered from an impermissibly great danger of misidentification. The State maintains that the first claim was never presented to the state courts and that, because it is unexhausted, the entire petition must be dismissed. Additionally, the State disputes the merits of each of Escalera's two arguments.

For the reasons that follow, the court finds that Escalera has exhausted his state remedies within the meaning of 28 U.S.C. § 2254(b) and (c), but that he is not entitled to habeas relief on the merits. Accordingly, the petition is dismissed.

I. *Background*

On August 18, 1975, at approximately 6:00 p.m., Pasquale Nieves and Felix Torres went for a walk in Fort Green Park in Brooklyn. They were accompanied by Jesus Cordero, his young son, and another friend. After they had been in the park for about thirty minutes, a man approached and asked if they had seen his dog. Shortly thereafter, four young men came up to that man and one asked whether he would give them money if they found his dog. The man said that he had no money.

Nieves and Torres, together with their friends, walked with the man who was looking for his dog. The four young men followed them. After approximately three to five minutes, the four young men stopped Nieves, Torres, and friends, indicating that it was a holdup. One of the four held a revolver, while the other three had knives.

Cordero, who was holding a small baseball bat, swung at the gun hand of the man with the revolver. He missed, and the man shot him. The four young men ran away, and Cordero died several days later of the single gunshot wound to his chest.

Nieves and Torres ultimately identified Robert Escalera as the gunman. Before trial, Nieves, Torres, and Detective Harold Ruger testified at a *Wade* hearing, *see United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), and the trial judge concluded that Nieves and Torres would be permitted to identify Escalera to the jury at his trial.

II. *The Preclusion Sanction*

In addition to testifying in his own defense, Robert Escalera called his friend Samuel Gonzalez as an alibi witness. Gonzalez, who knew Escalera for eighteen or twenty years at the time of the trial (T270),[1] testified that he met Escalera coming off a bus at 5:30 on the afternoon of the shooting (T272). According to his testimony, Gonzalez walked with Escalera to the latter's house (T273), left him there (*id.*), and then returned to Escalera's house at approximately 6:40 (T274). The two were together until approximately 7:30 (T274-81). This testimony was offered to negate the possibility that Escalera had been at the scene of the shooting when it took place, at approximately 6:30.

At the commencement of an afternoon session during Escalera's direct examination, his attorney advised the court—for the first time—that he intended to call Peter Escalera, the defendant's brother, as an alibi witness (T232). Counsel represented that it had been his intention to call Escalera's father, but that he changed his mind because the father was "very nervous" and "a cardiac patient [who] has to go for treatment on a regular basis" (*id.*). Peter Escalera was prepared to testify that his brother had been at home between 6:00 and 6:30 p.m. (*id.*). Before this colloquy, Escalera had not given notice that

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1 Numerals preceded by "T" are references to the trial transcript.

either his father or his brother might be called as an alibi witness.

The prosecutor was unimpressed by defense counsel's suggestion that he be given an opportunity to question the proposed alibi witness before he was to take the stand (T233). He stated: "I ask that the witness be precluded and that I be given ample opportunity to examine these witnesses with a stenographer present" (*id.*).[2] He also found it "strange" that he had heard nothing of Peter Escalera's proposed testimony until after the luncheon recess, even though the prospective witness had been in court all morning (*id.*).

The trial judge precluded Peter Escalera's testimony in view of New York's statutory requirement that criminal defendants provide, upon a demand by the prosecution, a list of alibi witnesses (T234). *See* New York Crim. Proc. Law § 250.20(1) (McKinney 1982). The notice of alibi statute provides:

> If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

Id. § 250.20(3).

The trial judge emphasized that Peter Escalera was not a witness whom the defendant would have had trouble locating (T234). To the contrary, "[h]e is a member of the family fully known to the defense throughout" (*id.*). Additionally, the trial judge noted the lateness of the application for leave to call the alibi witness (*id.*).

At the conclusion of all testimony, defense counsel renewed his application (T290). The trial judge responded:

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2 The prosecutor referred to "witnesses" in the plural because Escalera also proffered the testimony of Hector Ramos, who was not an alibi witness. Ramos's testimony is not at issue in this habeas petition.

> You seem to forget, Mr. Ortiz, that all of us, judges, defense attorneys, assistant district attorneys are under constant pressure to try cases and to dispose of cases that have been pending for a long time. We have had several discussions as this case has progressed. I have already made commitments which upon returning to my chambers I will start making phone calls for the next case to be tried.
>
> I'm going to repeat that here we have a proposed witness, a member of the family, a brother of the defendant with notice having been given some time ago. I don't have the date of alibi witnesses. And the name of a member of the family, a brother of the defendant, was not among those.
>
> You're asking me now to upset my whole schedule, the case that I anticipate calling for trial after I make several phone calls. And what you are proposing at this late hour could very well have been done a long time ago.
>
> I have been given no reason, no plausible reason why the name of the defendant's brother was not originally included in the alibi notice when there was ample time for the District Attorney to have had the opportunity to speak to this witness. I have heard nothing as to why this name was not included earlier. If you have any reason, then state it for the record [T291-92].

Defense counsel answered that he initially intended to stay away from calling family members as witnesses, because the jury might feel that relatives would lie on behalf of the defendant (T292). Escalera's attorney added, cryptically: "And there was only a question as to whether the father who was the one who was in the better position to observe what happened in the apartment would be the witness" (T292-93).[3] Counsel

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3 This remark followed the statement that defense counsel had shied away from Escalera's relatives because they might be distrusted by the jury; it also fails to explain why Escalera's father was omitted from the list of alibi witnesses.

continued that the prosecution would not be prejudiced by admission of the alibi testimony, since "Mr. Escalera and his father have been to the precinct and they have discussed the case with the investigating detective in this case" (T293).[4] The trial court adhered to its earlier ruling and the defense rested (T294). Escalera now contends that the order precluding his brother's alibi testimony violated the sixth amendment.

A. *Exhaustion of State Remedies*

The State contends that Escalera failed to exhaust his state remedies on the sixth amendment claim, as required by 28 U.S.C. § 2254(b) and (c). "It has long been settled 'that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus.' " *Gandia v. Hoke*, 648 F. Supp. 1425, 1427 (E.D.N.Y. 1986) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971)).

In *Daye v. Attorney General of the State of New York*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984), the court listed four ways in which the exhaustion requirement might be met, even without citation to the relevant constitutional provision:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

The State makes much of the fact that Escalera's brief to the appellate division alleged that the trial court had abused its

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4 In his memorandum of law in support of the habeas petition, Robert Escalera reads "Mr. Escalera" as a reference to his brother Peter. The court is of the view that, in context, "Mr. Escalera" seems more likely to apply to Robert. The discrepancy has no bearing on the court's disposition of this petition.

discretion under section 250.20 of the Criminal Procedure Law. According to the State, this demonstrates that there was nothing constitutional about Escalera's argument to the state courts. But, among other things, Escalera's brief said the following about *People v. Merritt*, 396 Mich. 67, 238 N.W.2d 31 (1976): "The Court noted that a judge's choice to invoke preclusion jeopardizes *the fundamental and important Constitutional right* of a defendant to have compulsory process for obtaining witnesses in his favor." Brief for Defendant-Appellant at 48, *People v. Escalera* (2d Dep't 1978) (emphasis added). At a minimum, *Merritt* is a state case employing constitutonal analysis in a similar fact situation (satisfying part (b) of the *Daye* test) and use of the term "compulsory process" called Escalera's sixth amendment rights to mind (satisfying part (c) of the *Daye* test). What is more, "[i]t is inconceivable that in finding 'no abuse of discretion' [the appellate division] did not implicitly hold that preclusion did not violate petitioner's right to due process of law." *Hackett v. Mulcahy*, 493 F. Supp. 1329, 1335 (D.N.J. 1980). Because the court finds that Escalera has satisfied at least two branches of the *Daye* test—either one of which would have been sufficient—it concludes that he has exhausted his state remedies. Accordingly, the court turns to the merits.

B. *The Sixth Amendment and Preclusion*

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ." U.S. Const. amend. VI. The defendant's right to compulsory process was applied to the states, through the due process clause of the fourteenth amendment, in *Washington v. Texas*, 388 U.S. 14, 18-19, 87 S. Ct. 1920, 1922-1923, 18 L. Ed. 2d 1019 (1967). The Supreme Court later turned its attention to alibi notice statutes, and held that they may not be enforced "unless reciprocal discovery rights are given to criminal defendants." *Wardius v. Oregon*, 412 U.S. 470, 472, 93 S. Ct. 2208, 2211, 37 L. Ed. 2d 82 (1973). Inasmuch as section 250.20(2) of New York's Criminal Procedure Law provides for

reciprocity—i.e., disclosure by the prosecution of alibi rebuttal witnesses—the statute passes the *Wardius* test. Escalera does not contest this. Instead, he maintains that the trial court's use of section 250.20(3) to preclude his calling his brother as an alibi witness violated the sixth amendment.

Wardius declined to decide whether a valid alibi notice statute could be enforced by an order precluding the testimony of alibi witnesses. 412 U.S. at 472 n.4, 93 S. Ct. at 2211; *accord Williams v. Florida*, 399 U.S. 78, 83 n.14, 90 S. Ct. 1893, 1897 n.14, 26 L. Ed. 2d 446 (1970). On three recent occasions, the Supreme Court has been one vote away from accepting a case that would decide the issue. *See Lane v. Enoch*, ____ U.S. ____, 106 S. Ct. 1281, 1281, 89 L. Ed. 2d 588 (1986) (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting from denial of *certiorari*); *Smith v. Jago*, 470 U.S. 1060, 1060-61, 105 S. Ct. 1777, 1777-78, 84 L. Ed. 2d 836 (1985) (White, J., joined by Burger, C.J., and Brennan, J., dissenting from denial of *certiorari*); *Taliaferro v. Maryland*, 461 U.S. 948, 948-50, 103 S. Ct. 2114, 2114-15, 77 L. Ed. 2d 1307 (1983) (White, J., joined by Brennan & Blackmun, JJ., dissenting from denial of *certiorari*).[5]

The closest Second Circuit precedent located by the court is *Ronson v. Commissioner of Correction of the State of New York*, 604 F.2d 176 (2d Cir. 1979) (per curiam). In *Ronson*, the court of appeals affirmed a grant of habeas corpus in favor of a petitioner who had been precluded from introducing the testimony of a psychiatrist because he had failed to comply with a New York statute requiring notice of an insanity defense. After noting that the sixth amendment right to compulsory process had been incorporated against the states, the Second Circuit observed:

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5 It is interesting to note that the only justice who dissented from denial of *certiorari* in all three cases was Justice White. Had any three of the other justices who joined his dissents in one case or another all joined in one case, the issue would have been presented to the Supreme Court. Few would dispute Justice White's observation that the issue "will surely not disappear of its own accord," *Smith v. Jago*, *supra*, 470 U.S. at 1061, 105 S. Ct. at 1778.

> While a defendant's right to call witnesses on his behalf is not absolute, a state's interest in restricting who may be called will be scrutinized closely. In this regard, maximum "truth gathering," rather than arbitrary limitation, is the favored goal.

Id. at 178 (citations omitted).

It was important to the *Ronson* court that defense counsel had "substantially complied with the notice requirements," *id.*, that counsel "did not intend or attempt to hide the issue from the state or the court," *id.* at 179, and that "he gave actual notice in all but precise form," *id.* Indeed, the defendant's request to introduce psychiatric testimony was denied in a second trial, after a mistrial had been declared in the first case in which the request had been made belatedly. *Id.*

Ronson does not provide much guidance in this case, because Escalera did not advise the prosecution or the court of his intent to call his brother as an alibi witness until well into the defendant's case. Whereas *Ronson* took care to guarantee that the form of the state's notice statute would not take precedence over the substance of the sixth amendment, here the failure to comply with the notice statute was more than merely a matter of form. Indeed, given the timing of Escalera's application and the absence of a good reason for its lateness, "[p]ermitting a continuance for further investigation as the sole sanction"—Escalera's suggestion—"is equivalent to abolishing alibi notice altogether," Comment, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Chi. L. Rev. 254, 276 (1984) (footnote omitted).

The question remains, however, whether preclusion is ever an acceptable sanction for failure to comply with an alibi notice statute. In *United States v. Davis*, 639 F.2d 239 (5th Cir. Unit B Mar. 1981), the court ordered a new trial for defendants who had been precluded from calling witnesses to impeach the character of a confidential informant. *Davis* held "that the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defen-

dants." *Id.* at 243. The holding rested on the notion "that the exclusion of relevant, probative, and otherwise admissible evidence is an extreme sanction that should be used only when justified by 'some overriding policy consideration.' " *Id.* (quoting *Braswell v. Wainwright*, 463 F.2d 1148, 1156 (5th Cir. 1972)). *Davis* found no such "overriding policy consideration" where a defendant failed to comply with a discovery order, because such "orders are designed to prevent surprise, not to protect the integrity of the evidence sought to be presented." *Id.*; *see Hackett v. Mulcahy*, 493 F. Supp. 1329, 1336 (D.N.J. 1980) ("The testimony of a defense witness may not be precluded because of defense counsel's failure to comply with court rules, unless the record reveals some complicity on the part of the defendant.").

Other courts have hesitated to adopt the per se rule of *Davis*. In a case frequently cited as setting forth a balancing test, *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1984), the majority declined to choose either the *Davis* rule or a balancing test, holding that the exclusion of an important defense witness was impermissible under either approach, *id.* at 1188.[6] The court emphasized that a balancing test could not survive sixth amendment scrutiny unless it "begin[s] with a presumption against exclusion of otherwise admissible defense evidence." *Id. Fendler* listed the following factors: the importance of the witness, which was deemed the most significant factor, *id.*; the prejudice to the prosecution, *id.* at 1189; and the willfulness of the discovery violation, *id.* at 1190. *See United States ex rel. Robinson v. McGinnis*, 593 F. Supp. 175, 180 n.3 (C.D. Ill. 1984), *aff'd mem.*, 753 F.2d 1078 (7th Cir.), *cert. denied*, 471 U.S. 1116, 105 S. Ct. 2360, 86 L. Ed. 2d 260 (1985).

The Seventh Circuit explicitly adopted a balancing test in *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982), in which it considered the sixth amendment implications of precluding

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6 The dissenting judge rejected *Davis* as inconsistent with the statement in *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973), that the right to confront and cross-examine is not absolute. *Fendler*, *supra*, 728 F.2d at 1193 (Alarcon, J., dissenting). Judge Alarcon preferred adoption of a balancing test. *Id.*

defendant's own alibi testimony. The court's primary concern was "the justification for the state interest," *id.* at 923, i.e., the prejudice suffered by the prosecution, *id.* at 924. *Alicea* also considered the state's "interest in facilitating the orderly administration of justice," *id.*, which, it was held, should not "override the accused's right to tell his version of the story," *id.* The court added that the prosecution had the ability to cross-examine the defendant, *id.*, and, if the defendant's testimony significantly weakened the prosecution's case, to "seek a continuance for further investigation," *id.* The Seventh Circuit rejected *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966), which upheld the preclusion sanction, largely because that case preceded the relevant Supreme Court decisions. *Alicea*, *supra*, 675 F.2d at 924-25. The Seventh Circuit later stated its balancing test as follows:

> In addition to preventing surprise, other factors considered before a witness preclusion sanction is employed to enforce discovery rules are: the effectiveness of less severe sanctions, the materiality of the testimony to the outcome of the case, prejudice to the other party caused by the testimony, and the evidence of bad faith in the violation of the discovery rules.

United States ex rel. Enoch v. Hartigan, 768 F.2d 161, 163 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 1281, 89 L. Ed. 2d 588 (1986).

This court agrees with the Seventh Circuit that a balancing test is appropriate. "An absolute prohibition of using the witness preclusion sanction to enforce notice of alibi rules is unnecessary. Such a prohibition could result in making trial courts powerless to prevent criminal defendants from concocting last minute alibis." *Braunskill v. Hilton*, 629 F. Supp. 511, 523 (D.N.J. 1986). In addition to the factors listed in *Enoch*, *supra*, this court considers the extreme lateness of Escalera's notice that he intended to call his brother as an alibi witness. The timing of the notice bears on several of the *Enoch* factors: the effectivness of less severe sanctions, prejudice to the prosecution, and bad faith by the defendant.

Starting with the proviso that there is a sixth amendment presumption against exclusion of otherwise admissible defense evidence, the court finds that the State has overcome the presumption on the facts of this case.

(1) The proffered testimony of Peter Escalera had to be a substantial surprise, coming, as it did, during the defense case.

(2) Sanctions less severe than preclusion would have been ineffective. A continuance could hardly deter violation of the alibi notice statute. *See* Comment, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. Chi. L. Rev. 254, 276 (1984). When the proffer was made, it was far too late to prohibit further discovery for Escalera. It is questionable whether the Constitution would permit the State to argue to the jury that a surprise alibi is unworthy of trust. *See id.* & n. 127. Nor does the court see much point to a contempt citation against the attorney who failed to provide notice, particularly because such a remedy would create a conflict between the attorney's desire to avoid punishment and the defendant's desire to hold on to his secret testimony as long as possible. *See id.* at 277.

(3) Peter Escalera's testimony might have been material to the outcome of the trial, since his testimony would have covered a time period that did not entirely overlap that to which Samuel Gonzalez testified. On the other hand, because the shooting took place at approximately 6:30 and Peter's testimony would have been that his brother had been home from 6:00 to 6:30, the proffered testimony was not as crucial as Gonzalez's. The jury could have believed that Robert Escalera was home until about 6:30 and then left to commit the crime. Additionally, it is quite likely that the jury would have discounted Peter Escalera's testimony as an attempt by the witness to save his brother from lengthy incarceration.

(4) By the time Escalera notified the court and the State that he intended to call his brother, the State had completed its case-in-chief. It is quite possible that, had the State received timely pretrial notice, it would have interviewed Peter Escalera and proceeded differently with the investigation of the crime, let alone presentation of its case at trial. Although the prosecutor

did not specifically discuss the prejudice to which the State would be subjected, a reference to the obvious potential for prejudice is implicit in the colloquy that attended the first notification that Escalera intended to call his brother. After defense counsel stated that he was willing to give the prosecutor ten or fifteen minutes to interview Peter Escalera and that this would not in any way jeopardize the State's case (T232-33), the prosecutor responded: "I am astounded by counsel's comment" (T233).

(5) Escalera's apparent bad faith—or, at least the absence of a good excuse—is evident in the very lateness of the notice. Peter Escalera was not a recently discovered witness. The only reason advanced for the lateness of notice as to Peter was counsel's representation that he had previously intended to call his father as an alibi witness. But the father was not listed on the witness list, either. After counsel's initial application was denied, he stated that his original intention had been to avoid calling family members, who might have credibility problems (T292). Although counsel changed his mind well into the trial, his reason was no more than a change in strategy. This court does not deem that a good reason, particularly after the defendant had had an opportunity to assess the strength of the State's case. If Escalera had even pondered calling his father or brother, he ought to have given notice before trial. This would have preserved his right to call alibi witnesses and the State's right to be prepared for such testimony, without any commitment on Escalera's part to actually call the witnesses. Such a procedure would have given Escalera the option of changing his strategy during the course of trial without any prejudice to the State.

In light of the foregoing factors, this court determines that the trial judge's preclusion order did not violate the sixth amendment. Although it should be a rare case in which the preclusion sanction is permissible, this is such a case. Not only has the Supreme Court upheld the right of states to pass alibi notice statutes, it has approved rule 12.1(d) of the Federal Rules of Criminal Procedure, which permits preclusion of alibi testimony by witnesses other than the defendant, in the event

of a failure to provide notice. The unmistakable implication is that the Court has refused to find a sixth amendment right to trial by ambush. Accordingly, this court rejects Escalera's first contention.[7]

III. *Identification Testimony*

"Long cautious about the accuracy of eyewitness identifications, the Supreme Court has steadfastly stressed that the reliability of the identification is the 'linchpin in determining the admissibility of identification testimony.' " *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir. 1982) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977)). Unless there is "a very substantial likelihood of irreparable misidentification," *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968), however, identification testimony should not be suppressed; instead, "such evidence is for the jury to weigh," *Brathwaite, supra*, 432 U.S. at 116, 97 S. Ct. at 2254; *accord Dickerson, supra*, 692 F.2d at 244.

When law enforcement authorities obtain identification of a suspect through unduly suggestive procedures, the remedy is not automatic exclusion of identification testimony. The Supreme Court has rejected a per se rule of exclusion because it would keep reliable and relevant evidence from the jury without deterring police misconduct, as well as have a deleterious impact on the administration of justice. *Brathwaite, supra*, 432 U.S. at 112, 97 S. Ct. at 2252. Thus, the "central question" becomes "whether under the 'totality of the circumstances' the identification was reliable even though the . . . procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

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7 It should be emphasized that this opinion does not deal with a late notice that was given before the commencement of trial, or with a mere technical defect in notice, or with a defendant's right to testify on his own behalf.

As suggested by the foregoing, a court considering the admissibility of identification testimony must ask two questions: (1) Were the circumstances surrounding the pretrial identification unduly suggestive of the suspect's guilt? (2) If so, balancing the suggestiveness of the identification procedures "against factors indicating that the in-court identification was independently reliable," is the testimony "clearly reliable, independent of improper procedures"? *Styers v. Smith*, 659 F.2d 293, 297 (2d Cir. 1981). If the second question is reached,

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, *supra*, 409 U.S. at 199, 93 S. Ct. at 382. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Brathwaite*, *supra*, 432 U.S. at 114, 97 S. Ct. at 2253.

The list of factors in *Biggers* has not been viewed as exhaustive, because the Court stated that the factors "include" those enumerated, but did not state that these are the only factors. One court has held that "[a]nother factor affecting the reliability of an identification is the prior familiarity the witness has with the accused." *Minetos v. Scully*, 625 F. Supp. 815, 819 (S.D.N.Y. 1986).

When all the relevant factors are weighed, the court must determine whether the prosecution has satisfied its burden of "establish[ing] by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [unduly suggestive pretrial] identification," *United States v. Wade*, 388 U.S. 218, 240, 87 S. Ct. 1926, 1939, 18 L. Ed. 2d 1149 (1967). Although the burden of proof at suppression hearings is generally no greater than proof by a preponderance of the evidence, *see United States v.*

Matlock, 415 U.S. 164, 178 n.14, 94 S. Ct. 988, 996 n.14, 39 L. Ed. 2d 242 (1974), the more strenuous clear-and-convincing standard is used in the *Wade* context because of the effect pretrial identification has in crystallizing future testimony, because it may be impossible to attack an unequivocal courtroom identification other than by raising the unfairness of suggestive pretrial identification, and because of the difficulty in determining whether in-court identification was based on independent recollection. *See Nix v. Williams*, 467 U.S. 431, 444-45 n.5, 104 S. Ct. 2501, 2509-10 n.5, 81 L. Ed. 2d 377 (1984). Against this background, the court considers the admissibility of the testimony of Nieves and Torres identifying Escalera as the gunman.

A. *Suggestiveness*

After the shooting of Jesus Cordero on August 18, 1975, Detective Harold Ruger showed an array of eight photographs to Nieves and Torres, separately, on September 3, but they were unable to make an identification (W25-26).[8] Twenty-five days later, on September 28, Detective Ruger showed Nieves and Torres ten photographs each. Again, Nieves and Torres were apart during the viewing, but this time Escalera's photograph was part of the array, and each witness identified him as the gunman (W28-29).[9]

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8 Numerals preceded by "W" are references to the transcript of the *Wade* hearing. Although Detective Ruger initially testified that seven photographs were displayed on September 3, it later became clear that there were eight photographs on that date (W42).

9 Nieves, who testified in Spanish, and Torres did not recall the sequence and viewings in exactly the same way as Ruger. Indeed, Torres recalled viewing photographs at the precinct house, together with Nieves (W 136-37). But the court credited Ruger's version, and this finding of a historical fact is entitled to the statutory presumption of correctness. 28 U.S.C. § 2254(d); *see Matusiak v. Kelly*, 786 F.2d 536, 543 (2d Cir.), *cert. dismissed*, _____ U.S. _____, 107 S. Ct. 248, 93 L. Ed. 2d 172 (1986); *Dickerson, supra*, 692 F.2d at 242-43; *see generally Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 1306, 71 L. Ed. 2d 480 (1982) (per curiam) (ultimate question as to constitutionality of pretrial identification procedures is mixed question of law and fact not governed by section 2254(d)).

The state court held—and this court agrees—that the photographic displays were not unduly suggestive. At neither viewing was either witness in the presence of anyone other than Ruger. The twenty-five day interval between the two displays was adequate to guarantee that Nieves and Torres would not recall the first eight photographs they had seen. Therefore, they would not assume that the suspect had to be one of the two persons added in the second array. Nor is there any contention that the photographic arrays were designed to facilitate the identification of Escalera as opposed to anyone else. *Cf. Styers, supra*, 659 F.2d at 297 (witness shown small group of photographs, only two of which were fresh and in color, and asked by officer, "Are these the two fellows?").

With regard to the photographic arrays, the *Wade* inquiry is closed by the finding that the procedures used were not unduly suggestive. The police, however, did something else to try to firm up the identification of Escalera. After Nieves and Torres identified Escalera's photograph, Detective Ruger brought the suspect to the 77th Precinct, 13th Homicide office. He then brought Nieves and Torres to the office and told them "I would like them to look at someone" (W30). Ruger placed the witnesses together in a room, where they viewed Escalera through a one-way mirror (*id.*). Each identified Escalera as the gunman (W31).

The trial judge noted that this showup procedure was "highly irregular, highly improper" (W166). "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall* v. *Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199 (1967) (footnote omitted); *accord Foster v. California*, 394 U.S. 440, 443, 89 S. Ct. 1127, 1128, 22 L. Ed. 2d 402 (1969). The dangers of suggestion are compounded when the witnesses view a showup together. *Cf. Wade, supra*, 388 U.S. at 234, 87 S. Ct. at 1936 (joint viewing of *lineup* fraught with dangers of suggestion); *id.* at 230 n.13, 87 S. Ct. at 1934 n.13 (use of one-way mirror impedes detection of suggestive influences). If "[s]uggestive confrontations are disapproved because they increase the likelihood of

misidentification," *Biggers*, *supra*, 409 U.S. at 198, 93 S. Ct. at 381, one would be hard pressed to conceive a procedure more suggestive than a showup where two witnesses view a single suspect through a one-way mirror. To reach the second stage of *Wade-Biggers-Brathwaite* analysis, it is not necessary to find that police procedures were "extraordinarily egregious; all that is required is sufficient suggestiveness in those procedures to justify looking to whatever countervailing indicators of reliability may exist." *Jarrett v. Headley*, 633 F. Supp. 1403, 1414 (S.D.N.Y. 1986) (citing *Dickerson*, *supra*, 692 F.2d at 248 n.3 (Newman, J. concurring)). That a showup is extremely suggestive does not foreclose admissibility, because the court must apply the *Biggers* factors to determine the reliability of the identification testimony under the totality of the circumstances. *See*, *e.g.*, *Hamele v. Manson*, 577 F. Supp. 439, 442 (D. Conn. 1983), *aff'd mem.*, 738 F.2d 418 (2d Cir. 1984).

B. *Reliability*

While condemning the highly suggestive showup, the trial judge observed that photographic identification was made beforehand (W167-69). The judge also found that the identification testimony of both Nieves and Torres was supported by substantial indicia of reliability. He concluded:

> From the testimony, the Court finds that the witness Nieves had ample opportunity on August 18th, 1975 to view the defendant; that he had ample opportunity to see the face of the defendant, who he testified fired the gun. The Court therefore concludes that the in-court identification made by Pasquale Nieves was based upon his own independent recollection, and was in no way influenced by the improper show-up at the police station and was in no way influenced by the exhibition of ten photographs, which the Court has viewed and which are received in evidence and which the Court finds that such exhibition of the photographs was not at all suggestive and did not influence the in-court identification made by the witness Nieves [W167].

As to Torres, the trial judge found that the witness had previously seen Escalera five, six, or seven times (W168), that the photographic arrays he saw were not unduly suggestive (W169), and that his in-court identification of Escalera was based upon his independent recollection (*id.*). The judge added that all the findings of fact he had made were established to his satisfaction beyond a reasonable doubt (*id.*), rather than merely by clear and convincing evidence, as required by *Wade*.

This court finds that the severity of the showup procedure's impropriety is largely mitigated by the prior identifications from non-suggestive photographic arrays. Obviously, circumstances would be different had the showup preceded the photographic exhibitions. *Cf. Wade*, *supra*, 388 U.S. at 229, 87 S. Ct. at 1933 (once witness picks accused out of lineup, he is not likely to go back on his word). Because the witnesses were made part of a suggestive procedure before trial, it remains necessary to apply the *Biggers* factors in order to determine the reliability of the in-court identification. *See United States v. Mills*, 704 F.2d 1553, 1563-64 (11th Cir.) (witness identified defendant first from photo array of all prison inmates and subsequently at one-on-one showup; given substantial independent basis for identification, in-court identification was admissible despite intervening suggestive procedures), *cert. denied*, 467 U.S. 1243, 104 S. Ct. 3517, 82 L. Ed. 2d 825 (1984).

1. *The Opportunity to View the Criminal at the Time of the Crime*

The first *Biggers* factor clearly favors admissibility in this case. Both Nieves and Torres testified that they had seen the gunman for several minutes before the holdup began and both faced the gunman during the holdup. Moreover, the witnesses saw the gunman at close range during daylight hours.

2. *The Witnesses' Degree of Attention*

As victims of a holdup at gun and knifepoint, Nieves and Torres had every reason to be attentive. *See United States ex rel. Phipps v. Follette*, 428 F.2d 912, 915 (2d Cir.) (Friendly, J.)

(person unaware crime is being committed—or even bystander who knew that one had been—has less desire than victim to seek out and retain image of perpetrator), *cert. denied*, 400 U.S. 908, 91 S. Ct. 151, 27 L. Ed. 2d 146 (1970); *accord Biggers, supra*, 409 U.S. at 200, 93 S. Ct. at 382.

3. *Accuracy of Witnesses' Prior Descriptions of Criminal*

Although Nieves and Torres were ambiguous in describing the gunman's race to the police—the gunman was alternatively described as black, black Hispanic, plain Hispanic, and having a sallow complexion—the ambiguities seem largely the product of semantic difficulties rather than an inability to describe the gunman. The witnesses consistently described the gunman as slight in stature, a teenager, with an Afro haircut, a moustache and no beard. Their descriptions of his clothing were essentially identical.

4. *Level of Certainty Demonstrated by Witnesses at Confrontation*

While the witnesses' certainty at the highly suggestive showup does not prove much—if anything—their independent selection of Escalera's photograph from a non-suggestive array, coupled with their failure to select a suspect from the prior array that excluded Escalera, shows a persuasive level of certainty. Both photographic arrays were viewed independently, and neither witness expressed any doubt upon seeing Escalera's photograph.

5. *Length of Time Between Crime and Confrontation*

The interval between the crime of August 18 and the photographic identification of September 28, while not insignificant, is not unduly long, either. If the other *Biggers* factors offered Escalera more support, the court would be disposed to find the six-week hiatus quite important. *See Jackson v. Fogg*, 589 F.2d 108, 111 (2d Cir. 1978) (one-month interval deemed "considerable"). Because, however, the other factors militate in favor of

admissibility, the court does not find the six-week interval greatly significant.

6. *Other Factors*

Torres' testimony that he had seen Escalera five to seven times before the incident is not entitled to a great deal of weight, because it took him some time to bring this to the attention of the police. Thus, even if Torres remembered Escalera from incidents preceding August 18, the memory was hardly indelible.

Far more significant is the timing of the suggestive showup. Because *Brathwaite* requires the court to balance the *Biggers* factors against the corrupting effect of the suggestive identification, *Brathwaite*, *supra*, 432 U.S. at 114, 97 S. Ct. at 2253, it is crucial that the showup *followed* an untainted photographic identification. In other words, the corrupting effect of the showup was, at best, minimal, because the showup merely confirmed the more difficult and impressive identification from the photographic arrays. Under all the circumstances, the trial judge was well within his authority to find that there was clear and convincing evidence that in-court identification of Escalera was based on observations other than the improper showup. Accordingly, Escalera is not entitled to habeas relief on the theory that his in-court identification was unconstitutional.

IV. *Conclusion*

Because the court has rejected both grounds advanced by Escalera, his petition for habeas corpus is hereby dismissed. Notwithstanding the dismissal of the petition, the court determines that Escalera presented substantial questions that are worthy of appellate review. Therefore, in the event Escalera chooses to appeal this court's judgment, this paragraph shall constitute a certificate of probable cause within the meaning of rule 22(b) of the Federal Rules of Appellate Procedure.

Dated: Brooklyn, New York
January 30, 1987

SO ORDERED,

/s/ I. Leo Glasser
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 United States Code § 2254:

> **State custody; remedies in Federal courts**
>
> . . . .
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the application did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for

hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

New York Criminal Procedure Law § 250.20:

Notice of alibi.

1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people, and file a copy of thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for service of the notice.

2. Within a reasonable time after receipt of the defendant's witness list but not later than ten days before trial, the people must serve upon the defendant or his counsel, and file a copy thereof with the court, a list of the witnesses the people propose to offer in rebuttal to discredit the defendant's alibi at the trial together with the residential addresses, the places of employment and the addresses thereof of any such rebuttal witnesses. A witness who will testify that the defendant was at the scene of the crime is not such an alibi rebuttal witness. For good cause shown, the court may extend the period for service of the list of witnesses by the people.

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

4. Similarly, if the people fail to serve and file a list of any rebuttal witnesses, the provisions of subdivision three, above, shall reciprocally apply.

5. Both the defendant and the people shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their witness lists as provided in this section.